

COMMITTEE REPORT

MADAM PRESIDENT:

The Senate Committee on Local Government and Elections, to which was referred Senate Bill No. 211, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

- 1 Page 1, between the enacting clause and line 1, begin a new
- 2 paragraph and insert:
- 3 "SECTION 1. IC 4-13.6-2-12 IS ADDED TO THE INDIANA
- 4 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
- 5 [EFFECTIVE JULY 1, 2007]: **Sec. 12. The department shall offer**
- 6 **instruction at least annually to:**
- 7 **(1) small businesses (as defined in IC 5-22-14-1);**
- 8 **(2) minority business enterprises (as defined in**
- 9 **IC 4-13-16.5-1); and**
- 10 **(3) women's business enterprises (as defined in**
- 11 **IC 4-13-16.5-1.3);**
- 12 **with regard to bonding requirements and working with the surety**
- 13 **industry to secure bonding for public works projects."**
- 14 Page 1, delete lines 6 through 16, begin a new paragraph and insert:
- 15 "SECTION 3. IC 4-13.6-7-5 IS AMENDED TO READ AS
- 16 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. (a) The director:
- 17 **(1) may require each contractor of a public works project with**
- 18 **an estimated cost of not more than two hundred thousand**
- 19 **dollars (\$200,000); and**
- 20 **(2) shall require each contractor of a public works project**

1 **with an estimated cost of more than two hundred thousand**
 2 **dollars (\$200,000);**

3 to submit a good and sufficient bid bond with the bid. The bid bond
 4 may equal any percentage of the estimated cost of the public works
 5 project that the director requires.

6 (b) The division may accept bonds provided on forms specified by
 7 the department or on forms given by surety companies."

8 Page 2, line 2, delete "five" and insert "**two**".

9 Page 2, line 3, delete "(\$500,000)," and insert "**(\$200,000),**".

10 Page 2, line 38, delete "five" and insert "**two**".

11 Page 2, line 38, delete "(\$500,000)," and insert "**(\$200,000),**".

12 Page 2, line 39, reset in roman "one (1) of the following:".

13 Page 2, reset in roman lines 40 through 42.

14 Page 3, reset in roman line 1.

15 Page 3, line 2, reset in roman "(2)".

16 Page 3, line 2, delete "the" and insert "The".

17 Page 3, line 2, reset in roman "will".

18 Page 3, line 2, delete "to".

19 Page 3, delete lines 6 through 30, begin a new paragraph and insert:

20 "SECTION 5. IC 4-13.6-7-7 IS AMENDED TO READ AS
 21 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 7. (a) If the estimated
 22 cost of the public works project is:

23 (1) at least ~~one hundred fifty~~ **two hundred** thousand dollars
 24 ~~(\$150,000)~~ **(\$200,000)**, the division shall; or

25 (2) **less than two hundred thousand dollars (\$200,000), the**
 26 **division may;**

27 require the contractor to execute a good and sufficient performance
 28 bond to the department for the state in an amount equal to one hundred
 29 percent (100%) of the total contract price.

30 **(b) The bond required under subsection (a) shall include at least**
 31 **the following provisions:**

32 (1) The contractor shall well and faithfully perform the contract.

33 (2) No change, modification, omission, or addition in or to the
 34 terms or conditions of the contract, plans, specifications,
 35 drawings, or profile or any irregularity or defect in the contract or
 36 in the procedures preliminary to the letting and awarding of the
 37 contract shall affect or operate to release or discharge the surety
 38 in any way.

1 (3) The provisions and conditions of this chapter shall be a part of
2 the terms of the contract and bond.

3 ~~(b)~~ (c) The division may permit the bond given by the contractor to
4 provide for incremental bonding in the form of multiple or
5 chronological bonds that, if taken as a whole, equal the total contract
6 price.

7 ~~(c)~~ (d) The division may accept bonds provided on forms specified
8 by the division or on forms given by surety companies.

9 ~~(d)~~ (e) The division shall not release sureties of a contractor until the
10 expiration of one (1) year after the final settlement with the
11 contractor."

12 Page 3, line 35, delete "five" and insert "**two**".

13 Page 3, line 36, delete "(\$500,000)" and insert "**(\$200,000)**".

14 Page 3, line 39, after "contract." insert "**A state agency may elect**
15 **to have a contract that is for not more than two hundred thousand**
16 **dollars (\$200,000) be governed by this chapter.**".

17 Page 4, delete lines 1 through 13, begin a new paragraph and insert:
18 "SECTION 7. IC 5-30-8-4, AS ADDED BY P.L.74-2005, SECTION
19 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1,
20 2007]: Sec. 4. (a) The public agency:

21 (1) shall require the design-builder to furnish performance and
22 payment bonds for the project **if the estimated cost of the**
23 **project is more than two hundred thousand dollars**
24 **(\$200,000); and**

25 (2) **may require the design-builder to furnish performance**
26 **and payment bonds for the project if the estimated cost of the**
27 **project is not more than two hundred thousand dollars**
28 **(\$200,000).**

29 (b) A performance or payment bond is not required for, and does not
30 provide coverage for, the part of a design-build contract that includes
31 design services only.

32 (c) Subsection (b) does not impair the ability of the public agency
33 to seek recovery under the contract from the design-builder for errors,
34 omissions, or defects in the design services."

35 Page 6, line 10, delete "may not" and insert "**shall**".

36 Page 6, line 11, delete "or" and insert "**and**".

37 Page 6, line 12, delete "unless" and insert "**if**".

38 Page 6, line 13, delete "five" and insert "**two**".

Page 6, line 13, delete "(\$500,000)." and insert "**(\$200,000). The authority may require a bid, performance, or payment bond from a contractor for a project if the estimated cost of the project is not more than two hundred thousand dollars (\$200,000).**".

Page 7, delete lines 13 through 42, begin a new paragraph and insert:

"SECTION 8. IC 8-23-7-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 19. (a) If an exchange under section 17 of this chapter includes improvements to be constructed on either parcel of real property, the department shall enter into an agreement with the owner of the parcel of property that the department will receive. An agreement under this section must include the following:

(1) The appraisal required under section 18 of this chapter must include the value of improvements constructed or to be constructed on the property.

(2) The construction contract for improvements under this section must be guaranteed by a construction or performance bond issued by a surety company approved by the department. **The department:**

(A) shall require a performance bond from a contractor for a project if the estimated cost of the project is more than two hundred thousand dollars (\$200,000); and

(B) may require a performance bond from a contractor for a project if the estimated cost of the project is not more than two hundred thousand dollars (\$200,000).

(3) The plans and specifications for improvements under this section must be certified by a licensed architect or engineer.

(b) The department must approve in writing the construction contract, bond, plans, and specifications for the improvements before entering into an exchange agreement under this section.

SECTION 9. IC 8-23-9-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 8. **The department:**

(1) shall require each bidder must to submit a bid guarantee and a performance bond payable to the state with the bidder's proposal if the estimated cost of the project is more than two hundred thousand dollars (\$200,000); and

(2) may require a bidder to submit a bid guarantee and a

1 **performance bond payable to the state with the bidder's**
 2 **proposal if the estimated cost of the project is not more than**
 3 **two hundred thousand dollars (\$200,000).**

4 ~~On contracts of one hundred thousand dollars (\$100,000) or less the~~
 5 ~~commissioner may waive the bond requirements. Instead of the bond,~~
 6 the department may establish by rule the requirements that, in its
 7 discretion, are necessary to assure payment of subcontractors,
 8 suppliers, and employees by the contractor.

9 SECTION 10. IC 36-1-12-4.5 IS AMENDED TO READ AS
 10 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 4.5. (a) **The political**
 11 **subdivision or agency:**

12 **(1) shall require** a bond or a certified check ~~shall~~ **to be filed with**
 13 each bid by a bidder in the amount determined and specified by
 14 the board in the notice of the letting **if the cost of the public**
 15 **work is estimated to be more than two hundred thousand**
 16 **dollars (\$200,000); and**

17 **(2) may require a bond or a certified check to be filed with**
 18 **each bid by a bidder in the amount determined and specified**
 19 **by the board in the notice of the letting if the cost of the public**
 20 **work is estimated to be not more than two hundred thousand**
 21 **dollars (\$200,000).**

22 (b) The amount of the bond or certified check may not be set at
 23 more than ten percent (10%) of the contract price. The bond or certified
 24 check shall be made payable to the political subdivision or agency.

25 (c) All checks of unsuccessful bidders shall be returned to them by
 26 the board upon selection of successful bidders. Checks of successful
 27 bidders shall be held until delivery of the performance bond, as
 28 provided in section 14(e) of this chapter.

29 SECTION 11. IC 36-1-12-13.1, AS AMENDED BY P.L.120-2006,
 30 SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 31 JULY 1, 2007]: Sec. 13.1. (a) Except as provided in subsection ~~(f)~~; **(e)**,
 32 ~~this section applies to contracts for public work only if the cost of the~~
 33 ~~public work is estimated to be more than one hundred thousand dollars~~
 34 ~~(\$100,000). (b) the appropriate political subdivision or agency:~~

35 **(1) shall require** the contractor ~~shall~~ **to execute a payment bond**
 36 to the appropriate political subdivision or agency, approved by
 37 and for the benefit of the political subdivision or agency, in an
 38 amount equal to the contract price **if the cost of the public work**

1 is estimated to be more than two hundred thousand dollars
2 (\$200,000); and

3 (2) may require the contractor to execute a payment bond to
4 the appropriate political subdivision or agency, approved by
5 and for the benefit of the political subdivision or agency, in an
6 amount equal to the contract price if the cost of the public
7 work is estimated to be not more than two hundred thousand
8 dollars (\$200,000).

9 The payment bond is binding on the contractor, the subcontractor, and
10 their successors and assigns for the payment of all indebtedness to a
11 person for labor and service performed, material furnished, or services
12 rendered. The payment bond must state that it is for the benefit of the
13 subcontractors, laborers, material suppliers, and those performing
14 services.

15 ~~(c)~~ (b) The payment bond shall be deposited with the board. The
16 payment bond must specify that:

17 (1) a modification, omission, or addition to the terms and
18 conditions of the public work contract, plans, specifications,
19 drawings, or profile;

20 (2) a defect in the public work contract; or

21 (3) a defect in the proceedings preliminary to the letting and
22 awarding of the public work contract;

23 does not discharge the surety. The surety of the payment bond may not
24 be released until one (1) year after the board's final settlement with the
25 contractor.

26 ~~(d)~~ (c) A person to whom money is due for labor performed,
27 material furnished, or services provided shall, within sixty (60) days
28 after the completion of the labor or service, or within sixty (60) days
29 after the last item of material has been furnished, file with the board
30 signed duplicate statements of the amount due. The board shall forward
31 to the surety of the payment bond one (1) of the signed duplicate
32 statements. However, failure of the board to forward a signed duplicate
33 statement does not affect the rights of a person to whom money is due.
34 In addition, a failure to forward the statement does not operate as a
35 defense for the surety.

36 ~~(e)~~ (d) An action may not be brought against the surety until thirty
37 (30) days after the filing of the signed duplicate statements with the
38 board. If the indebtedness is not paid in full at the end of that thirty (30)

1 day period the person may bring an action in court. The court action
 2 must be brought within sixty (60) days after the date of the final
 3 completion and acceptance of the public work.

4 ~~(f)~~ (e) This subsection applies to contracts for a capital improvement
 5 entered into by, for, or on behalf of the Indiana stadium and convention
 6 building authority created by IC 5-1-17-6. The board awarding the
 7 contract for the capital improvement project may waive any payment
 8 bond requirement if the board, after public notice and hearing,
 9 determines:

10 (1) that:

11 (A) an otherwise responsive and responsible bidder is unable
 12 to provide the payment bond; or

13 (B) the cost or coverage of the payment bond is not in the best
 14 interest of the project; and

15 (2) that an adequate alternative is provided through a letter of
 16 credit, additional retainage of at least ten percent (10%) of the
 17 contract amount, a joint payable check system, or other sufficient
 18 protective mechanism.

19 SECTION 12. IC 36-1-12-14, AS AMENDED BY P.L.120-2006,
 20 SECTION 5, AND AS AMENDED BY P.L.2-2006, SECTION 189, IS
 21 CORRECTED AND AMENDED TO READ AS FOLLOWS
 22 [EFFECTIVE JULY 1, 2007]: Sec. 14. (a) This section applies to
 23 public work contracts in excess of ~~one~~ two hundred thousand dollars
 24 ~~(\$100,000)~~ **(\$200,000)** for projects other than highways, roads, streets,
 25 alleys, bridges, and appurtenant structures situated on streets, alleys,
 26 and dedicated highway rights-of-way. **A board may require a**
 27 **contractor and subcontractor to include contract provisions for**
 28 **retainage as set forth in this section for contracts that are not more**
 29 **than two hundred thousand dollars (\$200,000).** This section also
 30 applies to a lessor corporation qualifying under ~~IC 21-5-11~~ IC 20-47-2
 31 or ~~IC 21-5-12~~ IC 20-47-3 or any other lease-back arrangement
 32 containing an option to purchase, notwithstanding the statutory
 33 provisions governing those leases.

34 (b) A board that enters into a contract for public work, and a
 35 contractor who subcontracts parts of that contract, shall include in their
 36 respective contracts provisions for the retainage of portions of
 37 payments by the board to contractors, by contractors to subcontractors,
 38 and for the payment of subcontractors. At the discretion of the

contractor, the retainage shall be held by the board or shall be placed in an escrow account with a bank, savings and loan institution, or the state as the escrow agent. The escrow agent shall be selected by mutual agreement between board and contractor or contractor and subcontractor under a written agreement among the bank or savings and loan institution and:

- (1) the board and the contractor; or
- (2) the subcontractor and the contractor.

The board shall not be required to pay interest on the amounts of retainage that it holds under this section.

(c) To determine the amount of retainage to be withheld, the board shall:

- (1) withhold no more than ten percent (10%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) completed, and nothing further after that; or
- (2) withhold no more than five percent (5%) of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection (f) *of this section* shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

- (1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.
- (2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.
- (3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions

1 consistent with this subsection, including provisions authorizing the
2 escrow agent to commingle the escrowed funds with funds held in
3 other escrow accounts and limiting the liability of the escrow agent.

4 (e) *Except as provided by ~~subsection~~ subsections (i) and (h)*, the
5 contractor shall furnish the board with a performance bond equal to the
6 contract price. If acceptable to the board, the performance bond may
7 provide for incremental bonding in the form of multiple or
8 chronological bonds that, when taken as a whole, equal the contract
9 price. The surety on the performance bond may not be released until
10 one (1) year after the date of the board's final settlement with the
11 contractor. The performance bond must specify that:

12 (1) a modification, omission, or addition to the terms and
13 conditions of the public work contract, plans, specifications,
14 drawings, or profile;

15 (2) a defect in the public work contract; or

16 (3) a defect in the proceedings preliminary to the letting and
17 awarding of the public work contract;

18 does not discharge the surety.

19 (f) The board or escrow agent shall pay the contractor within
20 sixty-one (61) days after the date of substantial completion, subject to
21 sections 11 and 12 of this chapter. Payment by the escrow agent shall
22 include all escrowed principal and escrowed income. If within
23 sixty-one (61) days after the date of substantial completion there
24 remain uncompleted minor items, an amount equal to two hundred
25 percent (200%) of the value of each item as determined by the
26 architect-engineer shall be withheld until the item is completed.
27 Required warranties begin not later than the date of substantial
28 completion.

29 (g) Actions against a surety on a performance bond must be brought
30 within one (1) year after the date of the board's final settlement with the
31 contractor.

32 (h) This subsection applies to public work contracts of less than two
33 hundred fifty thousand dollars (\$250,000). The board may waive the
34 performance bond requirement of subsection (e) and accept from a
35 contractor an irrevocable letter of credit for an equivalent amount from
36 an Indiana financial institution approved by the department of financial
37 institutions instead of a performance bond. Subsections (e) through (g)
38 apply to a letter of credit submitted under this subsection.

- 1 *(i) This subsection applies to the Indiana stadium and convention*
 2 *building authority created by IC 5-1-17-6. The board awarding the*
 3 *contract for a capital improvement project may waive any performance*
 4 *bond requirement if the board, after public notice and hearing,*
 5 *determines:*
 6 *(1) that:*
 7 *(A) an otherwise responsive and responsible bidder is unable*
 8 *to provide the performance bond; or*
 9 *(B) the cost or coverage of the performance bond is not in the*
 10 *best interest of the project; and*
 11 *(2) that an adequate alternative is provided through a letter of*
 12 *credit, additional retainage of at least ten percent (10%) of the*
 13 *contract amount, a joint payable check system, or other sufficient*
 14 *protective mechanism."*
 15 Delete pages 8 through 11.
 16 Page 12, delete lines 1 through 14.
 17 Renumber all SECTIONS consecutively.
 (Reference is to SB 211 as introduced.)

and when so amended that said bill do pass.

Committee Vote: Yeas 9, Nays 0.

Lawson C

Chairperson